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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOE MENDOZA, Plaintiff and Appellant, v. JOHN G. LANE et al., Defendants and Respondents.	D052242 (Super. Ct. No. 749778)

APPEAL from an order of the Superior Court of San Diego County, Jeffrey B. Barton, Judge. Affirmed.

This is the fourth time Joe Mendoza has brought an appeal arising from his same malpractice claims against defendants Dr. John Lane and Dr. Russell Dunnum (defendants). In this appeal, Mendoza contends the court erred in refusing to compel defendants to arbitrate a case that was resolved by a final judgment seven years ago. The contention is without merit, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2000, Mendoza filed a medical malpractice action against defendants. Shortly after, Mendoza requested the defendants to submit the matter to arbitration, but defendants declined. Mendoza did not bring a motion to compel arbitration, or take any other action to pursue arbitration. Instead, he affirmatively litigated the matter in the superior court.

In August 2001, the court entered summary judgments in defendants' favor based on its determination that the undisputed facts showed Mendoza could not prevail on his claims. Mendoza appealed from the judgments, and in April 2003, this court affirmed. (*Mendoza v. Lane* (Apr. 7, 2003, D039129) [nonpub. opn.] (*Mendoza I*).) We denied Mendoza's petition for rehearing and the California Supreme Court denied Mendoza's petition for review.

Mendoza then filed a motion in the superior court, seeking to vacate the August 2001 judgments. Mendoza claimed the judgments violated applicable statutes, and the judgments resulted from extrinsic fraud. The superior court found no support for these claims and denied the motion. Mendoza appealed, and we affirmed. (*Mendoza v. Lane* (Nov. 17, 2004, D043373) [nonpub. opn.] (*Mendoza II*).) The California Supreme Court denied Mendoza's petition for review, and the United States Supreme Court denied Mendoza's petition for certiorari and his subsequent petition for rehearing.

Shortly after, Mendoza filed a second motion in superior court to vacate the August 2001 summary judgments. The superior court denied this motion. Mendoza

appealed from that ruling. In September 2006, we affirmed the order. (*Mendoza v. Lane* (Sept. 2006, D047794) [nonpub. opn.] (*Mendoza III*).) We held the motion to vacate constituted an improper collateral attack on the August 2001 judgment. Mendoza petitioned for review in the California Supreme Court, and the court denied the petition in December 2006. On May 15, 2007, the United States Supreme Court denied Mendoza's petition for writ of certiorari in *Mendoza III.*

Three weeks later, on June 7, 2007, Mendoza appeared ex parte in the superior court requesting a "stay" of the proceedings to provide him the opportunity to compel arbitration of the medical malpractice claim that had been resolved against him. At the ex parte hearing, the court informed Mendoza that there was no pending litigation and judgment had been entered many years earlier.

Two months later, Mendoza served defendants with a motion to compel arbitration on the same claims that had already been litigated. Mendoza attached a copy of an undated arbitration agreement between himself and one of the defendants (Dr. Lane). Defendants opposed the motion on numerous grounds, including that the res judicata doctrine barred any new arbitration proceeding. In reply, Mendoza stated his petition was proper under Code of Civil Procedure section 1281.12 (section 1281.12), which

became effective in January 2007.[1] Mendoza argued that the "case has not yet had final determination after judgment, because it has been tolled . . . because of appeals court appeals, which have been going on." (Emphasis omitted.)

After a hearing, the court continued the matter for further briefing on section 1281.12. The order stated: "[t]he parties shall brief the issue whether section 1281.12 would apply to Mendoza's petition for arbitration which was filed after a final judgment and after remittitur, but within 30 days of the United States Supreme Court issuing a denial of a writ of certiorari."

After considering the parties' supplemental papers and holding a hearing, the court denied Mendoza's motion, finding section 1281.12 to be inapplicable. The court stated the case "has been fully litigated and the judgment is res judicata." The court further noted "there was never an arbitration agreement to enforce between [Dr. Dunnum] and [Mendoza]."

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[1] 1281.12 states: "If an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, shall toll the applicable time limitations contained in the arbitration agreement with respect to that controversy, from the date the civil action is commenced until 30 days after a final determination by the court that the party is required to arbitrate the controversy, or 30 days after the final termination of the civil action that was commenced and initiated the tolling, whichever date occurs first."

DISCUSSION

Mendoza contends the court erred in denying his motion to compel arbitration. The contention is without merit.

Under well settled res judicata principles, a party is not entitled to arbitrate a claim after the party has fully litigated the same matter in court and a final judgment has been entered. (Knight et al., Cal Practice Guide: Alternative Dispute Resolution (The Rutter Group 2007) ¶ 5:183.) After the final judgment, the claim is merged into the judgment and further proceedings are barred. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897.) Additionally, a party waives the right to arbitrate a matter by engaging in conduct inconsistent with a desire to arbitrate and by failing to bring the motion to compel within a reasonable time. (See *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195-1196.) "'A right to compel arbitration is not . . . self-executing. If a party wishes to compel arbitration, he [or she] must take active and decided steps to secure that right . . . .'" (*Bodine v. United Aircraft Corp*. (1975) 52 Cal.App.3d 940, 945.)

Under these principles, Mendoza has no right to arbitrate his medical malpractice claim. Defendants prevailed on the merits of the claim, and this final judgment was affirmed on appeal. The California Supreme Court denied Mendoza's petition for review. Mendoza has twice attempted to collaterally attack this final judgment, and has been unsuccessful both times. Seven years after a final judgment was entered against him, Mendoza is not entitled to begin again and arbitrate *the same claim* that has already been resolved against him.

Section 1281.12 does not change this conclusion. The code section provides that under certain circumstances a party who timely brings a civil action will not be barred by "*the applicable time limitations*" from arbitrating the case. (§ 1281.12, italics added.) The Legislature sought to ensure that a party who timely brings an action in superior court, but then was barred from litigating the action in that forum because of the existence of an arbitration agreement, does not forfeit his or her right to arbitrate the case because of the time necessary to resolve the initial superior court filing.

But by creating this tolling period the Legislature did not establish a new exception to res judicata and waiver principles. As stated in the underlying legislative history materials, "[T]his bill is intended only to provide assurance on the running of the statute of limitations, and is not intended to alter the law governing other consequences that may flow from a party's decision to file and otherwise pursue a claim in court as opposed to initiating arbitration . . . ." (Assem., 3d reading analysis of Assem. Bill No. 1553 (2005-2006 Reg. Sess.) as introduced Feb. 22, 2005.)

Mendoza relies on the "after the final termination of the civil action" phrase in section 1281.12 to argue that a party may arbitrate a matter after he was unsuccessful on the merits in the superior court. (See fn. 1, *ante*.) Viewing the language in context, the phrase refers to a "final termination" that was not on the merits, and does not reflect the Legislature's intent to permit a party to twice litigate the same claim in two different forums. Such a procedure would conflict with fundamental principles underlying our legal system pertaining to finality of judgments. (See *Kachig v. Boothe* (1971) 22 Cal.App.3d 626, 632.) "'"Public policy and the interest of litigants alike require that

there be an end to litigation." [Citations.]' [Citation.]" (*Mooney v. Caspari* (2006) 138 Cal.App.4th 704, 717.) If the Legislature intended to alter these essential rules, it would have said so directly.

In construing a statute, courts employ the rule "that a statute 'must be given a reasonable and common sense interpretation consistent with the apparent purpose and intent of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity.'" (*Welch v. Oakland Unified School Dist.* (2001) 91 Cal.App.4th 1421, 1428.) "Courts may . . . disregard even plain language which leads to absurd results or contravenes clear evidence of a contrary legislative intent." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1105.)

The Legislature could not have intended section 1281.12 to be interpreted to permit a party to litigate a matter in superior court, and to appeal those rulings to the California Court of Appeal, California Supreme Court, and United States Supreme Court, and then to allow the party to begin anew before an arbitrator *on the same claim.* (See *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 290 [statutory interpretation must avoid absurd results the Legislature would not have intended].)

DISPOSITION

Order affirmed. Mendoza to bear defendants' costs on appeal.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.